SIME DARBY BHD

v.

QUAH SWEE KHOON & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[ORIGINATING MOTION NO: R3-25-53-97]
24 SEPTEMBER 1998

ADMINISTRATIVE LAW: *Remedies - Certiorari - Decision of Industrial Court - Whether based on matters not pleaded upon - Whether rule as to pleadings applied equally to Industrial Court - Whether Industrial Court exceeded jurisdiction - Whether relevant considerations were taken into account*

LABOUR LAW: *Employment - Dismissal - Constructive dismissal - Proper legal test to be applied - Whether Industrial Court erred in law in applying test*

The 1st respondent, alleged that the applicant, constructively dismissed him pursuant to a reorganisation exercise. When the matter came before the Industrial Court, ie, the 2nd respondent, the 1st respondent argued that his responsibilities were substantially reduced and that his colleagues who reported to him previously were at a same level now. The Industrial Court held that the 1st respondent had valid grounds for asserting that he was constructively dismissed.

In this instance, the applicant applied for an order of *certiorari* to quash the award of the Industrial Court, on three grounds. Firstly, that the Industrial Court relied on grounds not pleaded or relied on by the 1st respondent. Secondly, that the Industrial Court erred in applying the wrong test to ascertain whether there was constructive dismissal. Thirdly, that the Industrial Court did not consider the fact the applicant had restored the position of the 1st respondent which was corroborated by documentary and oral evidence.

Held:

[1] The rule that parties should be bound by their pleadings applies equally to the Industrial Court, as was highlighted in the Federal Court case of *R Rama Chandran.*

[2] The 1st respondent did not allege, at any point in the Industrial Court, that the applicant had breached the implied term of maintaining the relationship of trust and confidence when he left their company. Thus, the Industrial Court had committed a serious error by deciding the case on a ground that had not been cited by the 1st respondent.

[2a] The Industrial Court had exceeded its jurisdiction by trying to find another reason to justify the 1st respondent's allegation. On this reasoning alone, the award could be quashed.

[2b] The Industrial Court had applied the wrong test, ie, by deciding on grounds of just and equity, when the proper legal test should have been the contract test.

[3] The 1st respondent had been informed that his position would be restored. The Industrial Court should have considered the overall evidence of the applicant instead of refusing it and accepting the 1st respondent's unsubstantiated version. The Industrial Court ought to have stated the reasons behind such a refusal. In so doing, relevant considerations were not taken into account.

[Application granted.]

Cases referred to:

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 ***(refd)***
Ang Beng Teik v. Pan Global Textile Bhd Penang [1996] 4 CLJ 313 ***(not foll)***
Anwar Abd Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 ***(foll)***
Kumpulan Perangsang Selangor v. Zaid bin Hj Mohd Noh [1997] 2 CLJ 11 ***(foll)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45 ***(foll)***

For the applicant - N Sivabalah; M/s Shearn Delamore & Co
For the respondents - Supathira Nathan; M/s Lobo & Assoc

Reported by Maheswaran Murugasen

JUDGMENT

Nik Hashim J:

This is an application by Sime Darby Berhad, ('the applicant') for an order of *certiorari* to quash Award No. 66 of 1997 of the Industrial Court dated 6 February 1997.

The facts are that Quah Swee Khoon, ('the respondent') commenced employment with the applicant as a junior engineer in 1978. He was promoted to the position of environment and quality control manager with effect from 1 January 1985. In July 1987 he was promoted as manufacturing manager. On 1 January 1993, there was reorganisation of the manufacturing division. Under this organisation, the manufacturing division was split into two divisions:

namely, the processing and engineering divisions. The respondent was appointed as the controller, processing division. On 24 July 1993 there was a further reorganisation of the engineering and processing division. Under this reorganisation, the engineering services division and the processing division were recombined to form the engineering and processing division responsible for its overall operations. To facilitate the foregoing reorganisation, the general manager of the engineering and processing division, COW2, held a meeting on 5 August 1993 with the respondent and one Mat Ali. Pursuant to the meeting, a circular dated 6 August 1993 was issued and received by the respondent on 7 August 1993. The circular letter reads as follows:

Inter-Office Mail: Dated 6 August 1993.

From : General Manager - Engineering & Processing

To : Controller - Processing Division

Visiting Manager - Processing Div.

Managers - Tali Ayer Mill

- Nova Scotia Mill

- Tennamaram Mill

- Bukit Rajah Mill

- Chan Wing Mill

- Kulai Mill

- Rengam Mill

MILL MANAGERS REPORTING LINE

To enable better co-ordination and accountability, it is necessary to streamline the line management of the mill. With immediate effect, the Mill Managers will report directly to the designated superiors as follows:

Managers	Direct Reporting
Tali Ayer Mill	Mr. Mat Ali A. Latiff
Nova Scotia Mill	”
Tennamaram Mill	”
Bukit Rajah Mill	”

Chan Wing Mill	Mr. Quah Swee Khoon
Kulai Mill	”
Rengam Mill	”

(Mr. Quah will also be in-charge of the Mono Muncher project in Kulai Mill).

Both Mr. Mat Ali and Mr. Quah Swee Khoon will report directly to the undersigned.

Sd.

Lee Yew Foong (COW-2)

c.c Divisional Director

Dissatisfied with the arrangement, the respondent wrote a letter to the divisional director on 20 August 1993, which states:

By Hand

Quah Swee Khoon
Sime Darby Plantations
20 August 1993

Divisional Director
Sime Darby Plantations
6 Floor, Wisma Sime Darby
Jalan Raja Laut
50350 Kuala Lumpur.

Dear Dato',

I refer to the Inter-Office Mail of 6 August 1993 together with the organisation chart dated 1 August 1993 from the General Manager - Engineering & Processing to me which was copied to your goodself.

My impression from the chart is that my position as Controller - Processing has been reduced to that of a Manager. In fact the chart shows that my colleagues who used to report to me are on par with me in the organisation. It is also clear from the chart that my responsibilities as Controller - Processing have been substantially reduced.

Since receiving the chart I have had occasion to make enquiries and now I am convinced that despite my good track record till to date (as it is evident from my bonus and annual salary increment payment last week) there is no basis for the Company to relegate me to a position of lesser responsibilities while retaining the cosmetic post of 'controller'.

Under the circumstances unless the Company rectifies the matter and withdraw the letter dated 6 August 1993 together with my position in the chart by

24 August 1993 I will have no alternative but to consider myself dismissed by the Company with effect from 25 August 1993.

Yours sincerely,

Sd:

(Quah Swee Khoon)

c.c. Mr. Lee Yew Foong - Controller - Engineering Processing

In its award, the learned Chairman of the Industrial Court recited both the applicant and respondent's arguments until p. 18 (p. 164 of record) of the award where he began to make his findings which appear at pp. 18 to 20 [at pp. 316 - 317 in the ILR]:

> The series of actions and the course of conduct taken by the Company (Applicant) affecting the Claimant (Respondent) were not just and equitable. The Claimant (Respondent) was put in a position with an overall effect that his functions were changed and his status as a senior executive downgraded. There was a variation in the Claimant's (Respondent's) contract of employment and this was done under the pretext of reorganisation which took place twice within one year.
>
> The Company (Applicant) by its conduct must have realised its breach and had purportedly attempted to rectify it. The Court is unable to see why COW-2, if the Company (Applicant) did intend to restore the Claimant (Respondent) to his original position, would not put its intention in writing on August 24, 1993. Instead COW-2 appeared to be more interested to rush to Tali Ayer Mill than to give an affirmative assurance to the Claimant's (Respondent's) ultimatum which expired on the same day. The company's (Applicant's) conduct in the circumstances was unreasonable and gave rise to the Claimant's (Respondent's) contention that it was genuine in its intention to restore him. The Court views COW-2' s evidence on the matter of restoration of the Claimant (Respondent) with reservation. The Court is not convinced COW-2 had told the Claimant (Respondent) about rectifying the breach.
>
> It is an implied term in contract of employment that an employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy the relationship of trust and confidence between them. *Woods v. W.M. Car Service Ltd.* [1981] ICR 666. The Court is of the view that in the circumstances of this case the acts complained of infringed such implied term. What the Company (Applicant) did to the Claimant (Respondent) crossed the line of legitimate reorganisation. Such attitude towards the Claimant (Respondent), who was a long serving senior employee of the Company (Applicant), commanding a salary of RM9,850.00 per month, was intended to humiliate the Claimant (Respondent) into abandoning his job.

> The Court also finds it hard to accept the contention that the Company (Applicant) had done everything possible in order to retain the Claimant's (Respondent's) service. The Company (Applicant) could have rectified the matter if it wanted to on September 1, 1993 when it issued the following letter instead of asking for three month's salary in lieu of notice of resignation from the Claimant (Respondent). It shows the Company (Applicant) did not want to retain the Claimant (Respondent) but wanted to get rid of him.

Accordingly, the learned Chairman of the Industrial Court held that the respondent had established that he had been constructively dismissed and such dismissal was without just cause or excuse, and awarded full backwages from the date of dismissal to the last date of hearing. The Industrial Court further awarded that the respondent be reinstated. Hence this application by the applicant to quash the award.

Mr. N Sivabalah for the applicant argued that the Industrial Court in arriving at its decision had committed a number of errors which rendered its decision perverse, a nullity and affected the Industrial Court's jurisdiction and he based his argument on three grounds:

(i) The Industrial Court in holding that there was a breach of an implied term of contract, relied on a ground that was never pleaded or relied on by the respondent.

(ii) In holding that the conduct taken by the applicant was not just and equitable applied the wrong test in determining if there was constructive dismissal.

(iii) In refusing to accept that the respondent was informed on 24 August 1993 that his position was restored failed to have regard to the clear evidence both documentary and oral that corroborated the applicant's assertion and contradicted the respondent's assertions.

Miss Supathira Nathan, for the respondent, in opposing the application, submitted that the facts leading to the breach of implied term of mutual trust and confidence was pleaded; the Industrial Court had applied the correct test in considering the respondent's dismissal and since the applicant's third ground is based on the findings of facts by the Industrial Court, therefore this court should not disturb it. She urged the court to dismiss the application as the applicant had no valid ground to raise the issue of judicial review in this case.

Having taken into account all that have been said by both counsel and having given the issue before me my most deliberate consideration, it is my judgment that there is much merit in Mr. N. Sivabalah's argument.

The rule that parties should be confined to the issues raised in their pleadings applies equally in the Industrial Court. The Federal Court in *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 has held that the parties are bound by their pleadings. The failure of the Industrial Court to address its mind to this fundamental issue is a serious error which affects jurisdiction and which will result in the award being quashed. In the present case, the Industrial Court made a serious blunder when it proceeded to hold that there was a constructive dismissal on a totally different and new ground which was never relied on by the respondent when he left the applicant's service, nor was it pleaded by the respondent in its statement of case. The Industrial Court at p. 165 of record held that:

> It is an implied term in contract of employment that an employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy the relationship of trust and confidence between them. *Woods v. WM Car Service Ltd.* [1981] 1 ICR 666. The Court is of the view that in the circumstances of this case the acts complained of infringed such implied term.

The respondent in his own letter of 20 August 1993 or in his own evidence before the Industrial Court never alleged that the applicant had breached the implied term of maintaining the relationship of trust and confidence when he left the applicant's service. This contention was never put to any of the applicant's witnesses that the applicant had breached this implied term. The respondent treated himself as constructively dismissed only on the basis that his position as controller – processing had been relegated to that of a manager on the strength of an organisation chart (C-2 in exh PR-1). Thus, the Industrial Court had taken irrelevant matters into account and failed to take relevant matters into consideration namely: the respondent's pleading and letter dated 20 August 1993, and the respondent's admission in cross-examination that the organisation chart which he relied upon to show his demotion did not show the status or rank of the persons nor did it indicate that his former subordinates were the same rank or status as him. Therefore, the Industrial Court, in coming to its finding that the applicant had breached the implied term of trust and confidence, which was not pleaded or raised in the respondent's evidence, had made an error in its trying to find another reason for the respondent's dismissal, different from what was stated to be the reason by the respondent, as a misdirection and an error in law, thereby exceeding its jurisdiction.

The contention of Miss Supathira Nathan at p. 13 para. 2 of her written submission that 'Based on our statement of case and the paragraphs which was cited above, the facts leading to the breach of implied term of mutual trust and confidence was pleaded' is untenable. There is nothing in the

statement of case and the paragraphs to support her contention. The Industrial Court cannot go into another reason for the dismissal not relied by the respondent or find one for it (see *Kumpulan Perangsang Selangor v. Zaid bin Hj Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789. Indeed, on this ground alone, I consider it is sufficient for an order of *certiorari* to be issued.

However, there are two other grounds advanced by the applicant which, to my mind, merit considerations by this court.

With regard to the second ground, it is the contention of Mr. N. Sivabalah that the Industrial Court had applied a wrong test in determining if there was constructive dismissal, and cited *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 MLJ 92 and *Anwar Abd Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197, to support his contention.

The Industrial Court made a finding at p. 164 of record:

> The series of actions and the course of conduct taken by the Company (Applicant) affecting the Claimant (Respondent) were not just and equitable ...

Both the then Supreme Court in *Wong* and the Court of Appeal in *Bayer*, *supra*, adopted and applied the 'contract test' that is "whether the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract" in constructive dismissal cases.

Miss Supathira Nathan, on the other hand, submitted that the law governing constructive dismissal is not just confined to the two authorities cited by the applicant's counsel but also includes the case of *Ang Beng Teik v. Pan Global Textile Bhd Penang* [1996] 4 CLJ 313; [1996] 3 MLJ 137, a Court of Appeal case.

YA Gopal Sri Ram, JCA in *Ang Beng Teik, supra*, at p. 152 at para F-G said:

> When it came to make the award, the Industrial Court addressed itself to the right issue. The question before the Industrial Court was not whether the appellant's reduction in rank amounted to constructive dismissal. The question was whether the termination of the appellant on 6 June 1989 was with, or without justification. In dealing with that question, the Industrial Court looked at the whole chain of events as forming part of one continuous story. That was the correct approach to take on the facts of this case. It asked itself all the right questions. It did not make any '*Anisminic* error' ....

His lordship at p. 158 at para. F continued:

> Accordingly, in our judgment, the Industrial Court – when it comes to decide whether a workman was dismissed without just cause or excuse – is wholly unconcerned with whether there was repudiation by the workman of his contract of employment which was accepted by the employer, but rather with the much broader question whether what happened to the workman was **just and equitable** .... (Emphasis added).

Mr. N. Sivabalah informed the court that the Federal Court has granted leave to appeal in *Ang Beng Teik's* case. It would appear to me that the views expressed in *Ang Beng Teik* regarding the test differs with the Supreme Court's decision in *Wong Chee Hong's* case. Until *Ang Beng Teik* is affirmed by the Federal Court, I would prefer to follow *Wong Chee Hong's* 'contract test'. Therefore, by applying the wrong test, ie, whether or not the actions taken by the employer were just and equitable, the Industrial Court obviously had erred in law in failing to apply the proper legal test governing a case based on constructive dismissal.

With regard to the third ground, I respectfully agree with Mr N. Sivabalah that the Industrial Court's decision is clearly perverse and unreasonable. It is to be noted that the applicant at the meeting on 24 August 1993 already informed the respondent that his position would be restored. Yet the learned Chairman proceeded to make a finding that the court was not convinced COW2 had told the respondent about rectifying the breach. The finding was based on mere allegation of the respondent which was not substantiated. It is true that the learned Chairman had made a finding of fact but in so doing he should consider the overall evidence of the applicant as well and gave reasons why he rejected the applicant's version. This he failed to do. The learned chairman had failed to take into consideration relevant matters which he was bound to consider, namely:

(a) The respondent's letters of 20 August 1993 (p. 74 of record) and 2 September 1993 (p. 77 of record) contradicted his testimony in court and tended to corroborate the applicant's version as to what transpired on 24 August 1993 and 2 September 1993 letter did not deny the contents of exh. CO-l (p. 37 of record).

(b) The applicant's letters all dated 1 September 1993 (pp. 78 - 80 of record) which corroborated the facts of what transpired at the meeting on 24 August 1993.

(c) The evidence of Mr. VN Ramachandran, COW1, which also corroborated the applicant's contention.

So, in the light of the clear evidence of the applicant, and in the absence of any good reason why he chose to accept the respondent's version, I hold that the Industrial Court's decision is unreasonable and perverse (see *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79).

The application before me concerns with the judicial review of the Industrial Court's decision. As adverted to earlier, the Industrial Court had exceeded its jurisdiction on the first ground and had erred in law on the second ground, and whilst the third ground, its decision is found to be perverse.

In the premises, I allow the application for an order of *certiorari* to quash the Industrial Court's award with costs to the applicant.